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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

APRIL APARICIO, Plaintiff and Appellant, v. THE VONS COMPANIES, INC., Defendant and Respondent.	B301017 (Los Angeles County Super. Ct. No. BC711305)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura A. Seigle, Judge. Affirmed.

Law Office of Maximilian Lee and Maximilian Lee for Plaintiff and Appellant.

Stone | Dean, Gregory E. Stone and Amy W. Lewis for Defendant and Respondent.

April Aparicio appeals from a judgment entered after the trial court granted the summary judgment motion filed by the Vons Companies, Inc. (Vons). Aparicio sued Vons for premises liability after she slipped and fell on what she believes was melted ice cream on the floor of a Vons supermarket. Aparicio contends the trial court erred in entering judgment on her claim because triable issues of fact existed whether Vons caused ice cream to spill onto the floor; whether Vons had actual or constructive notice of a spill; and whether the presence of an unattended shopping cart in the aisle created a dangerous condition. Aparicio also contends the trial court erred in sustaining Vons's objections to her and her expert's declarations. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Aparicio's Fall and the Lawsuit*[1]

On the afternoon of Sunday, March 25, 2018 Aparicio was shopping at a Vons supermarket in Covina when she slipped and fell to the floor in aisle 5, a frozen foods aisle. Aparicio believes she slipped on spilled and melted ice cream. Aparicio testified at her deposition, "I just remember walking down the aisle, and my legs giving out on me, and I was on the floor." Aparicio felt a wetness she described as "gooey or slippery stuff" on the floor and on her hands and elbows where they hit the floor. Aparicio did not know where the liquid came from. Aparicio did not see any

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[1] The factual background is taken from the evidence submitted by the parties in connection with Vons's motion for summary judgment. We indicate where the evidence is in dispute.

substance on the floor before or after she fell, and she could not remember if she looked for any wetness or stickiness on her clothing. Instead, she said she fell on something like "slippery ice cream on the floor." When asked how she knew it was ice cream, Aparicio responded, "I was in the ice cream section." Aparicio was about halfway down the aisle when she fell. She recalled seeing a shopping cart with "boxes of some sort" in her peripheral vision at the time she fell. She did not examine the boxes in the shopping cart and did not know what they contained.

A few minutes after Aparicio fell, Vons assistant store manager Esmerelda Sadler went to aisle 5 to investigate. In her deposition, Sadler testified she found nothing on the floor: "I was right there in the spot [Aparicio] said she fell on. There was nothing there to clean up." Sadler did not examine the shopping cart with cardboard boxes near where Aparicio fell. Sadler took photographs of the floor and Aparicio's shoes and pants.[2] Aparicio then filled out an incident report in which she stated the cause of her fall was "slippery ice cream[,] slippery floor."

On June 22, 2018 Aparicio filed this action against Vons[3] asserting premises liability claims for negligence and willful failure to warn.[4] Aparicio alleged Vons's floor was "negligently

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[2] Aparicio was wearing high-heeled shoes and long, loose pants at the time of incident.

[3] Aparicio also named Albertsons Companies, Inc., as a defendant. Albertsons Companies did not appear below and is not a party to the appeal.

[4] Although Aparicio checked the boxes on the form complaint for negligence and willful failure to warn, in opposition to Vons's summary judgment motion and on appeal Aparicio only argues liability under a negligence theory.

maintained, installed, or used" and was "unreasonably and unsafely slick, wet, and/or slippery."

B. *Video of the Incident*

The parties stipulated to the authenticity of video surveillance of aisle 5 recorded from approximately 2:30 p.m. to 3:30 p.m. on March 25, 2018. Aparicio lodged with her appeal an excerpt of this video that begins at 2:45 p.m. on its digital timestamp and ends at 3:05 p.m. The video shows aisle 5 with tall freezer cases on both sides of the aisle, a shopping cart filled with large brown cardboard boxes sitting unattended in the middle of the aisle, and a hand truck standing against a freezer to the left of the shopping cart.[5] The shopping cart and hand truck together blocked just over half of the left side of the aisle, leaving an open passage to the right of the shopping cart. The video shows a yellow safety cone at the far end of the aisle, but the cone is barely visible in the video, and it is unclear whether the cone was placed in aisle 5 or in the perpendicular aisle.

The video shows that at approximately 2:45 p.m. a shopper passed to the right of the shopping cart and slowly walked through the area where Aparicio later fell.[6] At 2:55:17 Vons store

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[5] We describe the aisle from the perspective in the video looking down the aisle, with the shopping cart and hand truck on the left side of the screen.

[6] Vons submitted still images of the surveillance video with its summary judgment motion that show additional individuals walking past the shopping cart and through the location where Aparicio later fell at 2:32:13, 2:32:31, 2:33:21, 2:33:33, 2:35:18, 2:35:28, 2:44:17 and 2:44:25. (All undesignated time stamps in this format are in the p.m.) These images show the unattended

clerk Dylan Priestly pushed a dry mop that appears to be approximately four feet wide down aisle 5, passing through the area to the right of the shopping cart. Priestly maintained a constant pace, reaching the end of the aisle at 2:55:35. About one minute later (at 2:56:26) two shoppers walked side by side and pushed a shopping cart through the area where Aparicio later fell. Around the same time Aparicio entered aisle 5 from the opposite end of the aisle carrying a shopping basket on her left arm. Aparicio passed the two shoppers before reaching the shopping cart at 2:56:40. Four seconds later, as Aparicio walked to the right of the unattended shopping cart, she slipped and began to fall sideways. As she fell, Aparicio reached her right arm out and touched the shopping cart, which rolled about a foot away, and Aparicio landed on the floor. No substance is discernable on the floor where Aparicio fell, which is shiny and white in the surveillance video.

At 2:56:54 the two shoppers who had just passed by returned to help Aparicio to her feet, and they gathered the items that had fallen out of Aparicio's shopping basket. At 2:58:31 Aparicio walked down the aisle toward the camera and out of the frame. At 2:59:25 Sadler walked down the aisle toward the shopping cart, then returned one minute later and pointed to scuff marks on the floor about 10 feet from where Aparicio fell. Sadler then continued down the aisle away from the camera and appears to talk to another Vons employee. Sadler walked through the area where Aparicio fell, but she did not stop in the

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shopping cart in the same position from 2:30 p.m. until Aparicio's fall.

area. Between 3:01 and 3:04 p.m. six people who appear to be customers walked through the area where Aparicio fell.

The surveillance video includes several gaps in the time stamp, including a 30-second gap after Priestly swept aisle 5 at 2:55:35 and just before the two shoppers and Aparicio entered the aisle at 2:56:26. Store director David Barragan testified in his deposition he believed the video cameras recorded constantly and he was not aware of any gaps in the footage of aisle 5 on March 25, 2018, but he added, "I don't know if [the cameras] turn off automatically or there [*sic*] are sensor driven or I don't recall."

C. *Freezer Malfunction and Frozen Food Removal*

On the afternoon of March 24, 2018 the freezers along one side of aisle 5 malfunctioned and could not maintain a sufficiently cold temperature, requiring the removal of all frozen food until repairs could be made. According to Barragan, the freezers had not been repaired as of March 25 (the day of Aparicio's fall), so they remained empty. Vons clerk Fabio Gaitan testified in his deposition he saw his coworkers using pallet jacks, shopping carts, and "banana boxes" to remove all the ice cream, pizza, and other frozen foods from the entire area and place the items in cold storage in the back of the store.[7] Gaitan did not notice any liquid pooling on the floor in aisle 5 while the freezers were broken. Gaitan did not testify as to the date or time when the freezers were emptied. But Gaitan testified his scheduled shifts in March 2018 ended at noon, and Vons reported the broken freezer at 12:48 p.m. on March 24. Thus, as Aparicio

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[7] Gaitan also testified if there was liquid ice cream on the floor, he would not use a dry mop to clean it up because it would "make it more worse, and it will splatter all over the floor."

argues, Gaitan's testimony supports a reasonable inference he saw the frozen food being removed on the morning of March 25. Sadler testified to the contrary that because she worked on March 25 and not March 24, and she did not see workers removing the frozen foods, the removal "had to have happened sometime Saturday" (March 24) or overnight.

Sadler did not know why a shopping cart filled with cardboard boxes was sitting in aisle 5 for at least 25 minutes prior to Aparicio's fall on March 25. But she also was not aware of any Vons policy prohibiting a shopping cart from remaining in an aisle for that length of time. Priestly testified in his deposition he had no recollection of seeing the shopping cart full of cardboard boxes when he swept aisle 5 on March 25 shortly before the incident, and after viewing the video footage, he acknowledged he did not examine the cart or the cardboard boxes in it. Asked by Aparicio's counsel what he was supposed to do if he came upon a shopping cart full of boxes in a store aisle, Priestly responded, "[P]robably, if I see a cart full of boxes, probably [tell] my supervisor." Priestly agreed it would be a good idea to report an unattended shopping cart "maybe for safety reasons or . . . somebody get[ting] hurt or something, slip and fall, I guess."

D. *Vons's Summary Judgment Motion*

On March 15, 2019 Vons filed a motion for summary judgment, arguing there were no triable issues of material fact that (1) Vons conducted reasonable inspections of the premises, including a floor sweep less than two minutes before Aparicio's fall; (2) Vons did not create any hazard that caused Aparicio's fall; and (3) Vons did not have reasonable time to discover and

correct any hazard. The motion was supported by declarations from Barragan and Priestly, deposition excerpts, images from the surveillance video, and photographs of the floor and Aparicio's clothing taken after the incident.

Priestly declared Vons's policies required a recorded sweep and inspection of the sales floor at least once every hour, which was required to be logged using a time clock and employee identification number. Priestly's custom and practice was to use a large dust mop and to walk through each aisle of the sales floor while inspecting the floor for any debris or spills, and if a spill were discovered, to "take action" to remove the spill. Priestly stated he followed Vons's policies on March 25 and conducted a sweep and inspection at approximately 2:00 p.m. and another at approximately 3:00 p.m. He adhered to his practice of using a large dust mop to sweep and inspect the sales floor, and he would have addressed a spill if he had found one.[8]

Barragan averred that Vons makes real-time recordings of areas of the store where customers have access and preserves the video for at least 30 days. If a customer reports a slip or fall to a store manager, it is Vons's policy to check to see whether video exists and to maintain it as evidence for potential litigation. Barragan stated, "In this case, there was a camera in aisle 5 that captured the incident involving [Aparicio] as well as a formal

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[8] Vons submitted a sweep log report showing that on March 25, 2018 Priestly logged sweeps at 12:29, 12:58, 1:30, 2:29, 2:57, and 3:29 p.m. Gaitan logged a sweep at 2:00 p.m., which is inconsistent with Gaitan's testimony his shifts in March 2018 ended at noon. Neither party raises this inconsistency, which we do not consider.

sweep by Dylan Priestly shortly before the incident that I captured and saved," and produced to opposing counsel.

E. *Aparicio's Opposition and Expert Report*

In her opposition, Aparicio argued the evidence Vons emptied its freezers on the morning of March 25, 2018 and left a shopping cart full of cardboard boxes for at least 25 minutes prior to Aparicio's fall raised triable issues of fact whether Vons created a dangerous condition by allowing frozen food in the shopping cart to melt onto the floor. Aparicio also asserted Priestly's use of a dry mop on melted ice cream exacerbated a dangerous condition. Further, there were triable issues whether Vons's periodic inspections were reasonable in light of its failure to investigate or remove the unattended shopping cart. Finally, Aparicio argued the trial court should draw adverse inferences based on Vons's admission it had not retained surveillance video of the aisle other than the 30 minutes before and after Aparicio's fall and there were gaps in the footage (e.g., a 30-second gap between 2:55:42 and 2:56:11, during the interval after Priestly's sweep but before Aparicio's fall), which showed spoliation of evidence in light of Barragan's testimony he believed the cameras recorded constantly.[9]

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[9] Aparicio attached a copy of Vons's response to her request for production No. 24, in which she asked Vons to "provide all video footage, photographs, or other visual records of all individuals seen on the footage from the frozen camera for [a]isle 5 at 2:56:30 PM on March 25, 2018." Vons responded it performed a diligent search for the video, and while surveillance cameras in other parts of the store may have shown the individuals seen in aisle 5 at 2:56:30 (Aparicio and the two

Aparicio stated in her declaration she entered aisle 5 to walk to the cash registers and noticed the freezers in the aisle were empty. She also "noticed a shopping cart full of boxes and had to walk around it to continue [her] path to the register." She stated she "unexpectedly slipped right next to the shopping cart positioned next to a dolly in the middle of the frozen food aisle. I lost consciousness due to the fall and I could not recall at least several seconds after my fall." Aparicio declared, "When I regained consciousness after my fall, I recall feeling wetness on my hands and elbows. I felt slippery wetness on the floor as well. When I checked my pants after my fall, I felt wetness on my pants."

Aparicio submitted a declaration from Philip Rosescu, a retained expert with a masters degree in civil engineering who works as a forensic engineer. Rosescu testified he had extensive technical and practical experience conducting safety investigations and premises analyses, and he had analyzed hundreds of slip and fall incidents. Based on his review of the documentary and video evidence and practical testing he conducted on the floor in aisle 5, Rosescu opined the store's smooth vinyl flooring, when wet with water, had a slip resistance factor as low as 0.18 compared to an American National Standards Institute baseline safe standard of 0.50. Based on independent studies of human ambulation, this slip resistance factor indicated a 75 percent chance of a slip event occurring when water was present on the floor. Rosescu also opined liquids

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shoppers), "the subject surveillance system is such that any surveillance would have been automatically overwritten after a period of time believed to be approximately 30 days as a result of routine, good faith operation of the surveillance system."

and foreign substances would go "easily unnoticed by customers, because the attention of the customer is intentionally directed away from the floor and toward merchandise displays and advertisements by the retailers."

Based on his review of the surveillance video, Rosescu opined Priestly's sweep was "wholly insufficient" because he "failed to sweep the entire aisle and only pushed the dry mop over 3 feet of the approximately 10 foot wide aisle. He also failed to be vigilant in identifying possible hazards. . . . Dry mops are ineffective in absorbing liquid contaminates from a floor's surface and would only smear the liquid over a larger surface, which could in turn exacerbate the already hazardous condition." Rosescu attached to his declaration a 2009 National Safety Council report which stated "clothing racks, fixtures and stock hand trucks" should be removed from the sales area "as soon as they have been emptied," they should not be placed to "block aisles," and "the use of pallet jacks, flat bed carts, dollies, and rolling appeal racks" should be minimized on sales floors during open hours." Based on this report, Rosescu opined Vons failed to follow general safety procedures and violated industry standards by leaving the hand truck and shopping cart in aisle 5, which obstructed half of the aisle and forced customers to pass through the narrower area where Aparicio fell. Finally, Rosescu opined Vons "tampered with" the video surveillance as evidenced by several gaps in the footage, including the 30-second gap in the time stamp between 2:55:42 and 2:56:11, and Vons failed to retain sufficient video footage by preserving only 30 minutes on either side of the incident. Rosescu opined, "Generally, it is common practice to retain an hour before the incident as well as an hour after."

Vons filed a reply brief and evidentiary objections to the Rosescu and Aparicio declarations. As relevant to the appeal, Vons objected to Aparicio's testimony she felt wetness on her pants on the ground her declaration was inconsistent with Aparicio's admission at her deposition she had no recollection whether she examined her pants and whether her pants were wet. Vons also asserted objections based on lack of foundation and speculation to Rosescu's testimony that Vons's floor sweep and inspection policies and practices were inadequate, that the shopping cart created a hazard, and that Vons's video retention practices were inadequate.

F. *The Trial Court's Ruling*

On the day of the June 6, 2019 hearing, Aparicio filed a request for leave to amend her complaint to allege the shopping cart constituted a dangerous condition independent of whether the contents of the cardboard boxes in the shopping cart melted onto the floor and caused Aparicio's fall. Aparicio's counsel argued at the hearing as to her request for leave to amend that Aparicio "would have braced herself, and she probably would have avoided much of the injuries—at least that's a reasonable inference—if she was able to fall straight on her hands. But the cart impeded her, and it affected her trajectory. And so she landed without the ability to really brace herself."

In the trial court's nine-page order issued later that day, the trial court found Vons met its initial burden to show there was no dangerous condition because there was no spill on the floor, and Vons had no actual or constructive knowledge of a dangerous condition. Aparicio's opposition relied on speculation and failed to present any evidence there was a spill beyond her

testimony she felt wetness on her hands, elbows, and the floor after her fall,[10] and this testimony was insufficient to support a reasonable inference a spill caused her fall, particularly in light of the evidence Vons swept the floor within two minutes prior to her fall.

The trial court denied Aparicio's request for leave to amend the complaint, reasoning even if the complaint were amended to include the proposed allegation Vons "negligently left a shopping cart in the middle of the aisle next to where Plaintiff fell," Aparicio's testimony in her declaration she "unexpectedly slipped right next to the shopping cart" and the video showing her hand pushing the cart away did not support a reasonable inference the shopping cart either caused or exacerbated her fall. The trial court observed there was no evidence Aparicio "hit or fell onto the cart or was more seriously injured as a result of the cart."

On June 21, 2019 Aparicio filed a motion for reconsideration contending the trial court erred in rejecting her theory the shopping cart constituted a dangerous condition. The motion was supported by a supplemental declaration in which Aparicio stated, "While falling, my right arm made contact with the shopping cart which impeded and interrupted my fall down to the floor. Had I been able to fall directly to the floor without the shopping cart in my way, I would have been able to use my right arm to brace myself to prevent my body from falling onto the floor in a way that caused me to sustain a concussion as well as other

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[10] The trial court sustained Vons's objection to Aparicio's declaration testimony she felt wetness on her clothes because it was contradicted by her deposition testimony. As we discuss below, the court also sustained several of Vons's objections to the Rosescu declaration.

significant injuries to my neck and back." Aparicio also argued the trial court erred in failing to sanction Vons and in crediting the video as evidence in light of Vons's spoliation and tampering. In support of her argument, Aparicio attached a copy of Vons's response to her request for production No. 20 asking Vons to provide all documents supporting its contention it was not responsible for her injuries, to which Vons responded it maintained and would produce "store security surveillance from the subject premises on the date of the alleged incident."

After a hearing on September 6, 2019, the trial court denied Aparicio's motion for reconsideration, finding Aparicio's updated declaration and Vons's discovery responses were not new evidence and could have been submitted in advance of the summary judgment hearing, and in any event, the surveillance video did not support Aparicio's contention the shopping cart impeded her fall, nor was there any evidence of spoliation or tampering. On September 9, 2018 the court entered judgment in favor of Vons. Aparicio timely appealed.

DISCUSSION

A. *Standard of Review*

Summary judgment is appropriate if there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc.,[11] § 437c, subd. (c); *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618; *Valdez v. Seidner-Miller, Inc.* (2019)

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[11] All further undesignated statutory references are to the Code of Civil Procedure.

33 Cal.App.5th 600, 607 (*Valdez*).) ""We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.'" [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party."" (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347; accord, *Valdez*, at p. 607.)

A defendant moving for summary judgment has the initial burden of presenting evidence that a cause of action lacks merit because the plaintiff cannot establish an element of the cause of action or there is a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853 (*Aguilar*); *Valdez, supra*, 33 Cal.App.5th at p. 607.) If the defendant satisfies this initial burden, the burden shifts to the plaintiff to present evidence demonstrating there is a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, at p. 850; *Valdez*, at p. 607.)

B. *The Court Did Not Err in Sustaining Vons's Objections to the Declarations of Aparicio and Rosescu*

Appellate courts are "split regarding the proper standard of review for the trial court's evidentiary rulings in connection with motions for summary judgment and summary adjudication." (*Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 368; accord, *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 ["[W]e need not decide generally whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo."].) "[T]he weight of

authority . . . holds that an appellate court applies an abuse of discretion standard" to evidentiary issues arising in the context of a summary judgment motion, except evidentiary rulings turning on questions of law, such as hearsay rulings, which are reviewed de novo. (*Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 226; but see *Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1451, 1451, fn. 10 [interpreting *Reid* to require de novo review of evidentiary rulings on a summary judgment motion].)

Under either a de novo or abuse of discretion standard, the trial court did not err in sustaining Vons's objection to Aparicio's statement in her opposition declaration that she "felt wetness" when she "checked [her] pants after [her] fall." This statement was inconsistent with Aparicio's earlier admissions during her November 9, 2018 deposition. Aparicio was asked, "Did you get any wetness on any [of] your clothing?" She responded, "I don't remember." When she was asked whether she ever "look[ed] for any wetness on [her] clothing," she responded, "I don't remember."

"'"[A]dmissions or concessions made during the course of discovery govern and control over contrary declarations lodged at a hearing on a motion for summary judgment."'" (*Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1196; see *Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, 1451 ["In determining whether any triable issue of material fact exists, the trial court may, in its discretion, give great weight to admissions made in deposition and disregard contradictory and self-serving affidavits of the party."]; see also *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21 [rule requiring affidavits be strictly construed in favor of party opposing summary judgment

"relaxed or altered" if "discovery has produced an admission or concession on the part of the party opposing summary judgment which demonstrates that there is no factual issue to be tried"].) Aparicio's admission seven months after the incident that she did not recall if she checked her pants for wetness precludes her subsequent self-serving statement that she did.

The trial court also did not err in sustaining Vons's objections to Rosescu's opinions that Vons's sweeping and inspection policies and practices were inadequate, Vons had tampered with the surveillance videos, and the unattended shopping cart created a hazard. As an expert, Rosescu's testimony was limited to the those matters on which he was qualified. Evidence Code section 720, subdivision (a), provides, "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert *on the subject to which his testimony relates*. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert." (Italics added.) Further, "'even when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise. [Citation.] For example, an expert's opinion based on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors [citation], has no evidentiary value [citation] and may be excluded from evidence.'" (*Sanchez v. Kern Emergency Medical Transportation Corp*. (2017) 8 Cal.App.5th 146, 155; see Evid. Code, § 801, subd. (b) [expert testimony must be "[b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at

or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates . . ."].)

Rosescu's declaration and his attached résumé establish he was trained as a civil engineer, had significant professional experience as a forensic engineer, and previously qualified as an expert witness "in safety, civil engineering, human factors, and accident reconstruction," with an emphasis on slip and fall incidents and the "slip resistance of walking surfaces." Thus, Rosescu was qualified to testify about the risk from a slippery floor or unremedied spills. But nothing in Rosescu's declaration showed he had experience in the grocery or similar retail business to support his opinion Vons failed to "follow basic safety policies and [procedures] as well as violated industry standards" with respect to floor sweeping and visual inspections. Likewise, Rosescu's declaration does not establish expertise in video analysis or surveillance practices to support his opinion Vons tampered with the video. Finally, although Rosescu's testimony Vons failed to meet industry standards by leaving an unattended shopping cart in the middle of the aisle where it impeded foot traffic was supported by the National Safety Council report, this opinion was irrelevant because Aparicio did not allege the shopping cart caused her fall by impeding her path.

C. *The Trial Court Did Not Err in Granting Summary Judgment on Aparicio's Premises Liability Claims*

1. *Law of premises liability*

The elements of a premises liability claim are the same as those of a negligence claim: "a legal duty of care, breach of that duty, and proximate cause resulting in injury." (*Kesner v.*

Superior Court (2016) 1 Cal.5th 1132, 1158; accord, *Summer J. v. United States Baseball Federation* (2020) 45 Cal.App.5th 261, 272, fn. 9.) "[L]andowners are required 'to maintain land in their possession and control in a reasonably safe condition' [citation], and to use due care to eliminate dangerous conditions on their property [citations]." (*Taylor v. Trimble* (2017) 13 Cal.App.5th 934, 943-944; accord, *Ortega v. Kmart Corp*. (2001) 26 Cal.4th 1200, 1205 (*Ortega*) ["It is well established in California that although a store owner is not an insurer of the safety of its patrons, the owner does owe them a duty to exercise reasonable care in keeping the premises reasonably safe."].) "A store owner exercises ordinary care by making reasonable inspections of the portions of the premises open to customers, and the care required is commensurate with the risks involved." (*Ortega*, p. 1205.)

"'On the issue of the fact of causation, as on other issues essential to the cause of action for negligence, the plaintiff, in general, has the burden of proof. The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. . . .' [Citation.] In the context of a business owner's liability to a customer or invitee, speculation and conjecture with respect to how long a dangerous condition has existed are insufficient to satisfy a plaintiff's burden." (*Ortega, supra*, 26 Cal.4th at pp. 1205-1206; accord, *Peralta v. The Vons Companies, Inc*. (2018) 24 Cal.App.5th 1030, 1035 (*Peralta*).) "Because the owner is not the insurer of the visitor's personal safety [citation], the owner's actual or constructive knowledge of the dangerous condition is a key to establishing its liability." (*Ortega*, at p. 1206; accord, *Peralta*, at p. 1035.) Moreover, "where the plaintiff relies on the failure to correct a

dangerous condition to prove the owner's negligence, the plaintiff has the burden of showing that the owner had notice of the defect in sufficient time to correct it." (*Ortega*, at p. 1206.)

2. *Vons met its burden to present evidence it did not create a dangerous condition by spilling ice cream onto the aisle 5 floor; Aparicio did not meet her burden to show there was a triable issue of material fact*

Aparicio contends Vons created dangerous condition by allowing melted ice cream from the broken freezers to spill onto and remain on the floor. But Vons met its initial burden to present evidence showing it did not cause melted ice cream or another liquid to spill on the floor in aisle 5, and Aparicio did not meet her burden in response to show there was a triable issue of material fact. (*Aguilar, supra*, 25 Cal.4th at p. 850; *Valdez, supra*, 33 Cal.App.5th at p. 607.)

The surveillance video shows there were no customers or Vons employees who removed anything from the freezers adjacent to where Aparicio fell for at least 26 minutes prior to the time Aparicio fell (i.e., between 2:30 and 2:56 p.m.).[12] Vons also

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[12] The video only shows that at 2:48:54 a customer removed a box of frozen food from the freezer on the left side of the screen—on the other side of the shopping cart. The testimony about the emptying of the freezers does not specify whether the freezers on the left or right side of the aisle were emptied. Further, Aparicio provided no evidence Vons tampered with the video. To the contrary, Barragan testified he recorded and produced the footage as it was captured on the surveillance system and provided to Aparicio. Although he thought the system recorded

produced evidence the freezers were emptied no later than noon on March 25, 2018, and Gaiton did not notice any liquid pooling on the floor in the aisle while the freezers were broken.[13] The shopping cart and the fall area are both clearly shown in the surveillance video, and nothing discernably leaked from the shopping cart or was dropped or spilled onto the floor during this time. Nor was any liquid or other substance visible on the floor in any portion of the video recorded between 2:30 and 3:30 p.m. Further, at least eight people walked directly through the fall area between 2:30 and 2:56 p.m., and another five people walked through the same area within 10 minutes following Aparicio's fall. None of the people moved in a manner indicating the floor was wet, slippery, or sticky. In addition, Priestly pushed a wide

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constantly, he acknowledged it might operate on a motion sensor. In addition, the video does not show any gaps or jumps when people are present in the frame, and the shopping cart, hand truck, and freezer cases remained unchanged from 2:30 p.m. to 2:56 p.m. Aparicio's related contention Vons spoliated evidence by failing to retain and produce more than a half hour of video footage on either side lacks merit. The trial court excluded Rosescu's opinion Vons should have retained an hour of video, and the discovery submitted in opposition to the summary judgment motion by Aparicio does not establish that additional footage would support her position.

[13] As noted, Vons contends the freezers were emptied on March 24, but Gaiton testified he witnessed the freezers being emptied, and his work schedule at the time supports a reasonable inference the freezers were emptied on March 25. But even assuming the freezers were emptied sometime before noon on March 25, there is no evidence the freezers were being emptied any time after 2:30 p.m., and the video shows they were not.

dry mop through the same area less than two minutes before the fall.

Vons produced photographs of the floor and of Aparicio's shoes and pants taken shortly after the incident, which likewise do not show any visible liquids or stains. Sadler testified she inspected the floor within minutes of the incident, as shown in the video, and she did not see anything on the floor that needed to be cleaned up. Priestly testified he followed his normal sweeping procedures and he would have addressed a spill if there was one. With this evidence, Vons met its burden to show there was no material evidence supporting a reasonable inference it had allowed melted ice cream or another liquid to remain on the floor during the half hour before Aparicio fell.

Aparicio failed to present material evidence to raise a triable issue in her opposition to the motion. Aparicio admitted she did not see ice cream or any other liquid on the floor before or after her fall and she did not know where the allegedly spilled liquid came from. She concluded the substance was ice cream because she felt "gooey or slippery stuff" and she was in the ice cream aisle. Further, Aparicio admitted the freezers around her were empty when she fell. Aparicio's contention the spill must have emanated from the cardboard boxes in the shopping cart is pure speculation because there is no evidence the boxes contained anything, let alone frozen foods. And as the trial court observed, even if the boxes contained melting ice cream, the reasonable inference would be that a spill would puddle underneath the shopping cart—which did not move after 2:30 p.m. at the latest—not where Aparicio slipped. The mere presence of the boxes in the shopping cart coupled with the fact Vons emptied the freezers

that morning does not support a reasonable inference Vons negligently left ice cream in the shopping cart for three hours.

Nor does the Rosescu declaration create a triable issue of fact. The admissible portions of the Rosescu declaration established that Vons's smooth vinyl floor constituted a significant slipping hazard when wet, but Rosescu did not opine that the floors were inherently unsafe when dry. Thus, his declaration does not support an inference Aparicio slipped because of the nature of the vinyl floor. (See *Peralta, supra*, 24 Cal.App.5th at p. 1036 ["Without any evidence showing that a slippery substance was in fact on the floor at the time she fell, or that others had slipped in the same location, there is no legitimate basis to support an inference that Vons's breach [by using a floor material that is dangerously slippery when wet] caused [plaintiff] to fall."].)

3. *Aparicio did not raise a triable issue of material fact that Vons was on constructive notice of wetness on the aisle 5 floor*

Aparicio contends that even if there is no evidence Vons caused the spill, she raised a triable issue of material fact that there was liquid on the floor where she slipped. Aparicio is correct her deposition testimony and declaration stating she felt "gooey or slippery" wetness on the floor and on her hands and elbows after her fall were sufficient to create a triable issue that there was liquid on the floor of aisle 5 when she fell. (See *Singleton v. United Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1588 ["'The facts alleged in the affidavits of the party against whom the motion is made must be accepted as true . . . .'"].)

However, absent evidence Vons created a dangerous condition, to establish premises liability Aparicio had to establish Vons had actual or constructive notice of the liquid "in sufficient time to correct it." (*Ortega, supra*, 26 Cal.4th at p. 1206.) Because there is no evidence of Vons's actual knowledge of a spill,[14] Vons could only be liable if it did not adequately and timely inspect the floor. (*Ortega*, at p. 1211 ["[F]ailure to inspect the premises within a reasonable period of time prior to the accident is indicative of defendant's negligence and creates a reasonable inference that the dangerous condition existed long enough for it to be discovered by the owner."]; *Peralta, supra*, 24 Cal.App.5th at pp. 1036-1037 [same].)

Vons presented evidence Priestly performed a sweep and inspection of aisle 5 consistent with Vons's policies approximately 90 seconds before Aparicio's fall. Combined with the undisputed evidence no spill was visible to Sadler, Priestly, Aparicio, or on the video, Vons's routine sweep and inspection was close enough in time to Aparicio's fall to negate an inference a dangerous condition existed long enough for Vons reasonably to discover it. (See *Peralta, supra*, 24 Cal.App.5th at p. 1037 [trial court properly granted summary judgment in favor of store where clerk's sweep was recorded fewer than eight minutes before plaintiff's fall, clerk did not see anything in his sweep, and

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[14] Aparicio contends Vons knew there was a spill hazard because there was a yellow cone near the entrance to the frozen food aisle. But Aparicio adduced no evidence why the cone was placed in the aisle, and the cone was placed a significant distance from where Aparicio fell, at the far end of aisle 5 where it met the perpendicular aisle. Aparicio's assertion the cone was placed on the floor to warn of an unremedied liquid spill is speculative.

plaintiff admitted she did not see any substance on the floor before or after her fall].)[15]

Aparicio argued in her opposition Priestly's sweep was inadequate and his use of a dry mop made the spill worse, but she presented no evidence to support these contentions other than Rosescu's declaration. As discussed, the trial court properly sustained Vons's objection to Rosescu's unqualified opinion Priestly's sweep was inadequate and the dry mop would have spread any liquid. Further, although we must credit Aparicio's testimony she felt some wetness on the floor after her fall, this testimony does not necessarily mean it was wet when Priestly swept it, even 90 seconds earlier. In that short time frame, for example, two other customers walked through the area where Aparicio fell. Aparicio also contends Priestly was looking up at the ceiling and not paying attention to the floor when he swept aisle 5, but Priestly testified he was looking at the floor ahead, and our review of the video corroborates Priestly's testimony.

Absent admissible evidence that Priestly's inspection and sweep were inadequate or liquid on the floor would have been visible to him, Aparicio failed to raise a triable issue of material

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[15] Aparicio also relies on *Sapp v. W.T. Grant Co.* (1959) 172 Cal.App.2d 89, 92, in which the Court of Appeal held there was a triable issue of material fact whether a 20-minute interval between an aisle inspection and plaintiff's fall showed there was a negligent inspection. But in that case it was undisputed plaintiff tripped on a spool of thread that came from a store shelf, and the spool was found on the floor where plaintiff fell. Further, it would be unreasonable as a matter of law to require Vons to sweep its floors more frequently than every 90 seconds, and Aparicio has not presented evidence the frequency of Vons's inspection of the aisles was inadequate.

fact that Vons was on constructive notice of a dangerous condition.

4. *There is no evidence the unattended shopping cart in aisle 5 caused harm to Aparicio*

Finally, Aparicio contends Vons's motion for summary judgment never addressed Aparicio's theory the shopping cart in aisle 5 constituted a dangerous condition that harmed Aparicio when it "impeded her fall to the ground," and therefore Vons did not meet its burden on summary judgment. This contention lacks merit.

The central flaw in Aparicio's argument is that she never asserted the shopping cart itself constituted a dangerous condition until the day of the hearing—after she received the trial court's tentative ruling to grant Vons's motion. Aparicio did not mention the shopping cart in her incident report. Nor did she allege in her complaint the shopping cart caused or exacerbated her fall. At her deposition, Aparicio testified she had only a "peripheral" awareness of the shopping cart. In her declaration in opposition to the summary judgment motion, Aparicio stated she noticed the shopping cart and "had to walk around it to continue my path to the register," but she described her fall as "unexpectedly slip[ping] right next to the shopping cart." Aparicio never stated the cart impacted her fall. Aparicio likewise did not argue in her opposition brief that the shopping cart constituted a dangerous condition.

Aparicio first raised her shopping cart theory on the day of the hearing on Vons's summary judgment motion in her request for leave to amend her complaint to allege "[t]he shopping cart itself constituted a dangerous condition." And it was not until

the hearing itself that Aparicio argued the cart "impeded her, and it affected her trajectory," causing her to land "without the ability to really brace herself." The trial court denied Aparicio's request for leave to amend, finding that even if the court were to grant her request, Aparicio had not presented any evidence to support her position the shopping cart caused her fall or caused her to be more seriously injured.[16]

Further, even if Aparicio's shopping cart theory had been at issue in the action at the time of the summary judgment motion, Vons met its burden to show there was no dangerous condition. Vons submitted Aparicio's deposition testimony in which she described her fall: "I just remember walking down the aisle, and my legs giving out on me, and I was on the floor." According to Aparicio, at the time of her fall the shopping cart was to her right. But when asked what caused her legs to give out, Aparacio responded "there was . . . something, like, slippery ice cream on the floor." This was sufficient to shift the burden to Aparicio to present material evidence the shopping cart contributed to her harm, which burden she did not meet. As the trial court found, Aparicio's statement in her declaration that she "unexpectedly slipped right next to the shopping cart" did not support a reasonable inference the shopping cart either caused her fall or exacerbated her injuries. The surveillance video showed Aparicio's right arm only briefly touched the shopping cart as she fell, and then the cart rolled away. Even viewed in the light most favorable to Aparicio, the video does not support Aparicio's contention the cart "interrupt[ed] her fall." Aparicio did not offer

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[16] Aparicio does not appeal the trial court's ruling denying her request for leave to amend the complaint.

an expert opinion as to the dynamics of her fall or her injuries. Although Rosescu offered his opinion Vons was negligent in leaving a shopping cart in the middle of an aisle, he did not opine the shopping cart caused or affected Aparicio's fall.[17]

Finally, Aparicio argues the trial court should in the interest of justice have considered the amended declaration she submitted in support of her motion for reconsideration, in which she stated "the shopping cart . . . impeded and interrupted [her] fall down to the floor" and had she been able to fall without the cart in her way, she could have used her right arm to prevent her from falling in a manner that caused her significant harm. However, the trial court properly denied Aparicio's motion for reconsideration because she did not present any new facts or law she could not have presented in opposition to the summary judgment motion. (§ 1008, subd. (a) [motion for reconsideration may be "based upon new or different facts, circumstances, or law"]; see *Torres v. Design Group Facility Solutions, Inc.* (2020) 45 Cal.App.5th 239, 243 ["If the motion to reconsider is based on new facts, the moving party must provide a satisfactory explanation for its failure to produce the evidence at an earlier time."].)[18]

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[17] Aparicio cites Priestly's deposition testimony he should report an unattended shopping cart "[m]aybe for safety reasons or . . . somebody get[ting] hurt or something, slip and fall, I guess." Even assuming Aparicio demonstrated a triable issue of material fact whether Vons was negligent in leaving a shopping cart in aisle 5 for at least 25 minutes, her premises liability claim still fails because there is no evidence the cart caused her harm.

[18] On appeal, Aparicio does not argue the trial court abused its discretion in denying the motion for reconsideration under

DISPOSITION

The judgment is affirmed. Vons is to recover its costs on appeal.

FEUER, J.

We concur:

PERLUSS, P. J. DILLON, J.*

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section 1008, subdivision (a). Instead, she relies on *Blue Mountain Development Co. v. Carville* (1982) 132 Cal.App.3d 1005, 1013 for the proposition an "an interim rather than a final ruling . . . may be corrected at any time up to final judgment, even in the absence of newly discovered evidence." But *Blue Mountain* was not in the context of a motion for summary judgment governed by section 437c. We need not reach whether the trial court could have considered Aparicio's amended declaration notwithstanding Aparicio's lack of compliance with section 1008. The trial court did not abuse its discretion in denying Aparicio's effort to assert a new theory of liability after the summary judgment motion had been fully litigated.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.